



MEMORANDUM

RE: **Deferred Action and Oregon's Driver License Law**

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This memorandum provides an analysis of ORS § 807.02, federal immigration law related to deferred action and the Deferred Action for Childhood Arrivals program.

Question Presented & Summary Answer

Q. Does “deferred action” satisfy ORS § 807.021’s requirement that a person is “otherwise legally present in the United States under federal immigration laws” when it was granted pursuant to the Deferred Action for Childhood Arrivals program?

A. YES. Deferred action (whether granted under the Childhood Arrivals program or any other program) constitutes a period of stay in the United States authorized by the Secretary of Homeland Security and satisfies the “legally present” requirement of ORS § 807.021.

DACA *documents* immigrants. Although deferred action through DACA does not alter a noncitizen’s technical “immigration status,” DACA provides a mechanism for an undocumented immigrant to become a documented immigrant pursuant to federal immigration law.

Background

In 2005, Congress enacted the REAL ID Act.¹ Among its many requirements, it required that Oregon, like the other states in the country, change the standards which it used to issue driver licenses in order for those licenses to be valid for federal purposes (such as airport screening or entering a federal building). The REAL ID Act's driver license

¹ The Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Div. B (The REAL ID Act), Pub. L. No. 109-13, 119 Stat. 231, 302 (May 11, 2005) (codified at 49 U.S.C. § 30301 note).

provision was rooted in the 9/11 Commission's report that driver licenses were considered seed documents that permitted undocumented immigrants to get established in the United States.² In 2008, Oregon passed Senate Bill 1080 that amended Oregon's driver license law to require all noncitizens to prove either that they are a lawful permanent resident or "otherwise legally present in accordance with federal immigration laws" before obtaining, renewing, or replacing a driver license. In essence, SB 1080 was intended to prevent undocumented immigrants from getting driver licenses. As a result, many Oregon residents were unable to renew, replace or apply for a driver license because they could not comply with the "legally present" requirement.

In June 2012, the Secretary of Homeland Security announced that certain noncitizen youth could be eligible for *deferred action*. The immigration benefits unit of the Department of Homeland Security, USCIS, announced the particulars of what came to be known as the Deferred Action for Childhood Arrivals program on August 15, 2012 and began encouraging and accepting applications for youth that satisfied the listed criteria.

Oregon Law – Senate Bill 1080

Effective on February 15, 2008, SB 1080 amended the Oregon Vehicle Code to require that each person seeking to obtain, replace, or renew any driver license, driver permit or identification card must provide proof of "both legal presence in the United States and a Social Security number or, if the person is not eligible for a Social Security number, proof of legal presence in the United States and proof that the person is not eligible for a Social Security number." It was codified at ORS § 807.021. The statute explains that:

A person provides proof of legal presence in the United States by submitting valid documentation, as defined by the department by rule, that the person is a citizen or permanent legal resident of the United States or is otherwise legally present in the United States in accordance with federal immigration laws.

ORS § 807.021(2)(a).

As the statute permitted, the Oregon Department of Transportation promulgated two relevant rules. First, OAR 735-062-0002(3) states that "legal presence" means "that the person is a citizen or permanent legal resident of the United States or is otherwise legally present in the United States in accordance with federal immigration laws." Second, OAR 735-062-0015 provides a list of documents that a person can use to prove "legal presence" or that the person is "legally present". Among the items listed are "U.S. Department of

² See The Final Report of the National Commission on Terrorist Attacks Upon the United States (July 2004) at 390; Dep't of Homeland Security, *Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes*, Final Rule, 73 Fed. 5272, 5273 (Jan. 29, 2008).

Homeland Security issued documents, not expired, including ... Employment Authorization card (I-688A, I-688B and I-766)[.]”

Deferred Action Under Federal Immigration Law

What is deferred action? Deferred action is the exercise of prosecutorial discretion by the Secretary of Homeland Security to formally recognize that a particular noncitizen is present in the United States and to decide not to pursue enforcement, such as removal, of the noncitizen.³

What does a grant of deferred action mean? In granting deferred action, the Secretary authorizes the temporary stay in the United States of a noncitizen. Long before the DACA program, deferred action had been a feature of federal immigration law since at least the 1970s when John Lennon applied for it.⁴ Deferred action is a discretionary decision by the Department of Homeland Security not to pursue enforcement against a person for a specified period. A grant of deferred action does not alter an individual's existing immigration status.

How does the Secretary decide to grant deferred action? In keeping with the constitutional limits on the Executive power, deferred action may not be granted on a categorical basis in the same way that a public law operates. Instead, it may only be granted on a case-by-case basis in the exercise of the Secretary's discretion.

Historically, deferred action has been administered both programmatically to similarly situated groups of immigrants and also on an ad hoc basis.⁵ Any noncitizen can ask for deferred action on an ad hoc basis. The noncitizen would make a written request to USCIS seeking an acknowledgement of his presence in the United States and the exercise of prosecutorial discretion not to enforce deportation. The USCIS (exercising the Secretary's power) would then determine whether to actually grant deferred action.

The difference between a programmatic approach and an ad hoc approach is also a matter of discretion wherein the Secretary has found that certain fact patterns common to a group of people are worthy of the attention and scarce resources of DHS. For example, deferred action is available to battered spouses, like all noncitizens, on a case-by-case

³ Memorandum from Bo Cooper, General Counsel, U.S. Immigration and Naturalization Service, on INS Exercise of Prosecutorial Discretion, (available at INS and DOJ Legal Opinions §99-5 MB 2006); USCIS, *Deferred Action for Childhood Arrivals, Frequently Asked Questions* (updated Sept. 14, 2012) available at: www.uscis.gov/childhoodarrivals (last visited 12/18/2012).

⁴ See Shoda Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 Conn. Pub. Int. L.J. 243, 246-47 (2010) (describing the “nonpriority program” and Lennon's and Yoko Ono's immigration case).

⁵ See T. Alexander Aleinikoff, David A. Martin, Hiroshi Motomura & Maryellen Fullerton, *Immigration and Citizenship: Process and Policy* 776 (6th ed. 2008).

basis. However, because the Secretary has deemed battered spouses as a group to be particularly worthy of her attention, she has dedicated resources (e.g., adjudications staff, created prescribed forms, created regulations) to analyzing requests for deferred action from these noncitizens.

This is the same approach the Secretary has taken with regards to immigrant youth. Having determined that there are likely favorable discretionary factors common to noncitizen youth meeting the description set forth in her June 15, 2012 memorandum, the Secretary has dedicated resources to processing deferred action requests. The Secretary has organized her resources into the program called Deferred Action for Childhood Arrivals. To assist her in making decisions to grant (or deny) deferred action to individuals fitting the listed factors, she created a form (I-821d), established a filing process, proscribed a filing fee, and offered additional guidance on the circumstances in which she would favorably and unfavorably exercise her discretion.⁶ Immigrant youth that do not meet the requirements of the June 15 memo *may still* seek deferred action. However, the Secretary might not use the program structure of DACA to adjudicate their requests.

Is a noncitizen granted deferred action legally present in the United States? YES. Deferred action is a period of stay in the United States authorized by the Secretary of Homeland Security. Deferred action *documents* an immigrant by recognizing his presence and authorizing his stay for a period of time.⁷ Under federal immigration law, a noncitizen granted deferred action is considered “lawfully present” in the United States because his stay is authorized. *Cf.* INA § 212(a)(9)(B)(ii) (defining “unlawful presence” for inadmissibility purposes); USCIS Adjudicator’s Field Manual § 40.9 (explaining that noncitizens with deferred action are not unlawfully present); *see also*, Social Security Administration, *Who can be assigned a Social Security number?*, 20 C.F.R. § 422.104(a)(2) (authorizing Social Security numbers when stay is “under the authority of law” to work in the United States.) The Social Security Administration assigns Social Security numbers to DACA grantees.

Is deferred action an immigration status? No. For federal immigration law, “immigration status” is a term of art that refers to certain categories or classifications of noncitizens by

⁶ See USCIS, Deferred Action for Childhood Arrivals, Frequently Asked Questions (updated Sept. 14, 2012) available at: <<www.uscis.gov/childhoodarrivals>> (last visited 12/18/2012);

⁷ *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999) (“Approval of deferred action status means that...no action will thereafter be taken to proceed against an apparently deportable alien”); *Matter of Quintero*, 18 I&N Dec. 348, 349 (BIA 1982) (“deferred actions status is...permission to remain in this country.”); *Matter of Pena-Diaz*, 20 I&N Dec. 841, 846 (BIA 1994) (deferred action “affirmatively permit[s] the alien to remain” in the country); *Ga. Latino Alliance for Human Rights v. Governor of Ga.*, 691 F.3d 1250, 1258-59 (CA11 2012) (a noncitizen “currently classified under ‘deferred action’ status...remains permissibly in the United States[.]”).

statute. Deferred action status is not “lawful status” in the sense that it is not a prescribed statutory classification (such as a tourist, a student, or a permanent resident).⁸

The term “deferred action status” frequently appears in cases, in the media, and in public announcements. To the extent that any of these statements are references to an “immigration status” as a statutory classification, they are incorrect. Thus, it is proper to say that deferred action is not a “lawful status” and does not alter a noncitizen’s immigration status as USCIS has done in its FAQ on the Childhood Arrivals webpage.

However, outside of the technical aspects of federal *immigration* law, deferred action is considered a “lawful status”. As particularly relevant here, Congress has recognized “deferred action status” as a lawful status. *See* REAL ID Act of 2005, § 202(c)(2)(B). In requiring all states to create a driver license that satisfies a federal standard that mandates that all individuals demonstrate lawful status, Congress provided that a “State shall require, before issuing a driver’s license or identification card to a person, valid documentary evidence that the person --- (viii) has approved deferred action status[.]” *Id.*

Is DACA different from other grants of deferred action? NO. Deferred action granted under the Deferred Action for Childhood Arrivals program is legally identical to every other type of deferred action granted by the federal immigration authorities. DACA is a programmatic approach whereby the Secretary determined that youth meeting certain characteristics merit additional resources in processing their claims for deferred action status. She established a form (I-821d) and rules to guide her discretionary case-by-case decision-making. In the end, the deferred action that is granted is identical to other grants of deferred action because the source of the authority to grant deferred action is the same. *See* INA § 103(a) (providing statutory authority to the Secretary to “perform such... acts as [s]he deems necessary for carrying out [her] authority” to administer and enforce the immigration laws.)⁹ In one instance, the federal government has limited DACA grantees from seeking specialized federal health insurance. In August 2012, the Secretary of Health and Human Services published a new regulation, about a specialized Medicaid program called the Pre-Existing Condition Insurance Plan, that altered its definition of “lawfully present” for purposes of the insurance plan to exclude DACA grantees.¹⁰

⁸ *See* Declaration of Bo Cooper, *Arizona Dream Act Coalition, et al., v. Brewer, et al.*, 12-CV-02546-DGC, Doc. #32 (filed 12/14/2012) at 9.

⁹ Federal regulations authorize the issuance of employment authorization documents (form I-766) to noncitizens granted deferred action. 8 C.F.R. § 274a.12(c)(14). According to USCIS processing instructions, the employment authorization documents for individuals granted deferred action through the Childhood Arrivals program will bear the classification “(c)(33)” on the face of the document. *See* USCIS, Form I-765, Application for Employment Authorization, available at: <<<http://www.uscis.gov/i-765>>>.

¹⁰ *See* Dept. of Health and Human Services, *Pre-Existing Condition Insurance Plan Program, Amendment to interim final rule with request for comments*, 77 Fed. Reg. 52614, (Aug. 30, 2012) (codified at 45 C.F.R. § 152.2(8)). This regulation is irrelevant to Oregon’s driver

Can Oregon treat DACA grantees differently than other deferred action grantees? No. It would be a violation of ORS § 807.021 and the United States Constitution if Oregon placed any limitations on DACA grantees. The United States Constitution prohibits the State of Oregon from intruding on the federal government's exclusive power to regulate immigration. The power to classify noncitizens – either their status or presence in the United States – is a core federal immigration power.¹¹ Because the federal government has classified deferred action grantees under DACA as being lawfully present in the United States, Oregon is prohibited from making or changing the classification in any way.¹² The Secretary has classified DACA grantees as lawfully present; it would be unconstitutional if Oregon reclassified them – even for DMV license purposes – as not lawfully present.

Will the Oregon legislature or Oregon Governor be required to create new laws before DACA grantees are eligible for licenses? No. Oregon law presently authorizes DACA grantees to obtain driver licenses. No new authority is needed. Indeed, Oregon's law, ORS § 807.021, is very similar to many other states' driver licenses laws. Thirty-six (36) states presently issue drivers licenses to DACA grantees.¹³ Even Alabama and Georgia authorize driver licenses for noncitizens with deferred action. Presently, only Arizona, Michigan, and Nebraska have policies in place to deny licenses to DACA grantees.

Conclusion

DACA *documents* immigrants. It satisfies the spirit and text of ORS § 807.021. Because deferred action granted under the DACA program is, like all deferred action, a period of stay authorized by federal immigration law, it satisfies the "legally present in accordance with federal immigration law" requirement of ORS § 807.021. Because DACA grants satisfy the statute, it would appear that the Oregon DMV *must* issue licenses to DACA-approved youth.¹⁴

license law because ORS § 807.021 makes reference to "federal *immigration* law", not Medicaid insurance law.

¹¹ *Plyler v. Doe*, 457 U.S. 202, 225 (1982) (explaining that the right to classify noncitizens is "committed to the political branches of the Federal Government" and that the "States enjoy no power with respect to the classification of aliens.")

¹² *Id.* at 219 n.19, 226 (states may, in limited circumstances, "borrow the federal classification" or "follow federal direction" but they may not "independently exercise" the power to classify noncitizens.)

¹³ See National Immigration Law Center, *Overview of State Driver's License Requirements for Individuals Granted Deferred Action under the Deferred Action for Childhood Arrivals (DACA) Policy* (Dec. 2012) (available at: <<<http://www.nilc.org/dacadriverslicensestbl.html>>>) (last visited 12/18/2012).

¹⁴ The information in this memorandum is not legal advice and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case.